Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court for the United States

No. 79-1292

GEORGE WINSHIP NUNNALLY, III, BARRY KEY NUNNALLY, Individually And As Class Representative For Possible Future Adopted Children, Issue And Descendants, Presently Unknown and Unborn Of The Children Of JESSIE McKEE HODGSON And For Possible Adopted Descendants Presently Unknown And Unborn Of MARGARET McKEE MOORE,

Petitioners,

vs.

TRUST COMPANY BANK, As Co-Trustee Under Part Two Of Item Eight Of The Will Of JESSIE M. McKEE, Late of Fulton County, Georgia, HUGH McKEE NUNNALLY, Individually And As Co-Trustee Of Part Two Of Item Eight Of The Will Of JESSIE M. McKEE, JESSIE NUNNALLY BRUMBY, CORA NUNNALLY MILLER, McKEE NUNNALLY, JR., Individually And As Guardian Ad Litem For HUGH McKEE NUNNALLY, II, SALLY DAY NUNNALLY and ELIZABETH L. O'CALLAGHAN And As Class Representative For Possible Future Natural Born Children, Issue And Descendants, et. al., MARTHA NUNNALLY O'CALLAGHAN, MICAJAH PECK BRUMBY, HUGH McKEE NUNNALLY, II, (A Minor), SALLY DAY NUNNALLY, (A Minor), ELIZABETH L O'CALLAGHAN, (A Minor), MARGARET McKEE MOORE, JESSIE MOORE ALLRED, PERRY ERVIEN CANN, HUGH McKEE CANN, JESSIE MARGARET ALLRED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in the above entitled case on November 6, 1979, and the denial of the petitioners' Motion For Rehearing entered on November 21, 1979.

CITATIONS TO OPINIONS BELOW

As of the date of this printing, the opinion of the Supreme Court of Georgia is unreported, as is the denial of the petitioners' motion for rehearing which was rendered without an opinion. The slip opinion of the Supreme Court of Georgia is reprinted as "Appendix A" to the petition. The denial of petitioners' motion for rehearing is reprinted as "Appendix B" to this petition.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on November 6, 1979. Rehearing was denied on November 21, 1979. When the Supreme Court of the State of Georgia denied these petitioners' motion for rehearing the judgment of that court became a final judgment of the highest court in the State of Georgia to which this case could be taken.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Georgia by Writ of Certiorari is invoked under 28 USC Section 1257(3).

QUESTION PRESENTED

Whether a state law which discriminates against adopted persons to exclude them from taking under a Will that does not expressly include adopteds is an unconstitutional violation of the Equal Protection Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution, USC Const. Amend. 14, provides, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent portion of the Georgia statute under constitutional attack is Ga.L. 1941, p. 300, 305-306:

> "Section 11. *Final Order of adoption* . . .If the court is satisfied that a final order of adoption should be entered, the court shall enter a decree of adoption, declaring the said child to be the adopted child of the petitioner [the adopting parent], and capable of inheriting his estate, and also what shall be the name of such child. Thereafter, the relation between such person and the adopted child shall be as to their legal rights and liabilities, the relation of parents and child, except the petitioner or petitioners shall never inherit from the child. When the final adoption shall have been granted, the [natural] parents of the child shall be divested of all legal rights or obligations from them to the child or from the child to them; and the child shall be free from all obligations of any sort whatsoever to the said natural parents. *To all other persons the adopted child shall stand as if no such act of adoption had been taken.*"
> (emphasis added)

STATEMENT OF THE CASE

This case concerns the construction of a trust established under the Will of Jessie M. McKee. The Will was silent as to whether adopted persons would participate as trust beneficiaries, and the Georgia adoption statute in effect at the time of the testatrix's death governs the construction of her Will. The applicable 1941 adoption statute provided that adopted children were capable of inheriting from the adopting parents' estate, but, as to all other persons, the adopted child stood as if no action of adoption had been taken. Petitioners assert that the 1941 Georgia adoption statute is an unconstitutional violation of the Fourteenth Amendment to the Constitution in that the state has impermissibly drawn an invidious distinction between children adopted into a family and those born into it.

The Will

Jessie M. McKee executed her Last Will and Testiment in 1942 and died in 1945.

The Will created a trust which is the subject of this case.[1] The income from the trust was to be paid to the testatrix's daughter for her life. At her daughter's death, the trust was to be divided into four shares and continued in trust for the benefit of her daughter's living children. If any of the four children of the testatrix's daughter did not survive their mother, then that share was to be distributed to the children of that child.

The testatrix's Will neither expressly included, nor expressly excluded adopted persons from the named classes of "children", or "issue", or "descendants".

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[1] The provisions of the Will creating the trust are reprinted as Appendix C to this Petition.

Jessie M. McKee's Will was probated on December 13, 1945. The income from the trust was paid to her daughter until her death in 1977. At the time of her death, the testatrix's daughter was ırvived by three of her four children: Hugh McKee Nunnally, Jessie Nunnally Brumby, and Cora Nunnally Miller. The fourth child, Winship Nunnally, Jr., had predeceased his mother. He was survived by two adopted sons, petitioners, George Winship Nunnally, III and Barry Key Nunnally.

George Winship Nunnally, III was born on October 19, 1947, and adopted by Winship Nunnally, Jr. on June 20, 1948; Barry Key Nunnally was born on January 20, 1949, and was adopted by Winship Nunnally, Jr. on December 17, 1949.

Proceedings In The Court Below

The co-trustee, Trust Company Bank, instituted this Will construction case to determine whether the adopted children were trust beneficiaries. Upon stipulated facts, the trial court held that the law in effect at the time of the trust termination [1971][2] determined the class of beneficiaries and that the adopted children were included as beneficiaries of the trust under the Georgia law in effect in 1977.

On appeal, the Supreme Court of Georgia reversed and held that under the law at the time Jessie M. McKee died in 1945 [Ga. L. 1941, p. 300, 305-306] an adopted child was capable of in-

---

[2] That portion of the statute here under attach was amended in 1949 (after the death of the testatrix) to provide that an "adopted child shall be considered in all respects as if it were a child of natural bodily issue of peitioner or petitioners, and shall enjoy every right and privilege of a natural child of petitioner or petitioners; and shall be deemed a natural child of petitioner or petitioners to inherit under the laws of descent and distribution in the absence of a will and to take under the provisions of any instrument of testamentary gift, bequest, devise or legacy unless expressly excluded therefrom." Ga.L. 1949, p. 1157. See also Ga.L. 1977, pp. 201, 219.

heriting from his adopting parents' estate *but as to all other persons, the adopted child stood as if no action of adoption had been taken*. The Supreme Court of Georgia held that this 1941 adoption statute controlled the construction of the Will in this case. The court remanded for the trial court's consideration of the other issues raised by the petitioners' pleadings including the constitutional issue presented herein. [*Nunnally, et al.* vs. *Trust Company Bank,* 243 Ga. 42 (1979)].

Upon remand the trial court found that Ga. L. 1941 p. 300, 306 was patently invidious because it worked to exclude adopted persons based upon biological grounds only, however, it was not constitutionally invalid because it was not accomplished through state action.

The Decision Of The Supreme Court Of Georgia

Petitioners appealed the judgment of the trial court to the Supreme Court of Georgia and the court affirmed the decision of the trial court. In the course of its opinion, the Supreme Court of Georgia held:

> "Mrs. McKee's two adopted great-grandsons appeal, contending that the trial court erred because the 1941 adoption statute is an unconstitutional violation of the Equal Protection clause of the United States Constitution . . ."
>
> ". . . the state assumes that one would rather have his or her property pass within the bloodline rather than have people with a bare legal relationship to them share. We would consider this assumption a rational means to dispose of property in an orderly fashion."
>
> "One legislative objection in this case is the orderly disposition of property, and the means by which this is accomplished is presuming that a decedent, not a direct party to the act of adoption, would not intend for his or her property to pass to an adopted child but would rather intend for the property to pass through the bloodline. The sole question is whether this assumption on the part of the state is one rational way to achieve the orderly disposition of property. We conclude that it is."
>
> "Contrary to the finding of the trial court, we conclude that there is state action involved in the operation of this statute . . . Even though state action is involved we do not find a 'invidious discrimination' in the statute such as would render it unconstitutional."

REASONS FOR GRANTING THE WRIT

The Georgia Supreme Court's opinion recognized that the 1941 Georgia adoption statute was determinative in excluding the petitioners from the class of trust beneficiaries.

> " . . . the law of the case directs that Section 11 [of the 1941 Ga. Adoption Statute] be used to construe Mrs. McKee's intent in her silence, and that same section is the one used to guide administrators when no will is present, much less a silent one, as to the meaning of 'children' . . . Contrary to the finding of the trial court we conclude that there is state action involved in the operation of this statute. *Section 11 dictates a result that would occur each time a will was silent as to the meaning of 'children' or intestacy occured in a family with adopted children.* This was not a neutral, nondiscriminating state law of will construction. This was the state making up the decedent's mind for him.
>
> The statute plays the decisive role in supplying the missing intent of the silent testatrix. 'This is true because the statute fixing our rules of inheritance must be construed in pari materia with our adoption statute. [cit]'. *Thornton* vs. *Anderson* 207 Ga. 714, 717 (64 SE2d 186) (1951)." (emphasis added)

The single issue presented by this case is whether the statute's discrimination between children adopted into a family and those born into it is *rationally related* to a permissible state objective. *Mathews* vs. *Lucas,* 427 US 495, 96 S.Ct. 2755, 49 L.Ed. 2d 651; *Trimble* vs. *Gordon,* 430 US 762, 92 S.Ct. 1459, 52 L.Ed. 2d 31. Petitioners respectfully submit that there is no such relationship.

The opinion of the Georgia Supreme Court states:

> "One legislative objective in this case is the orderly disposition of property and the means by which this is accomplished is presuming that a decedent, not a direct party to the act of adoption, would not intend for his or her property to pass to an adopted child but would rather intend for the property to pass through the bloodline.
>
> The sole question is whether this assumption on the part of the state is one rational way to achieve the orderly disposition of property. We conclude that it is."

Opinion, p. 6

While the state has a valid interest in the orderly disposition of property upon death, that interest is not rationally furthered by the statutory discrimination against adopted children. Adopted children and natural children occupy the very same status except for the obvious biological difference. Bloodline is the only difference between the natural and the adopted child.

Although the state must make choices in this area of legislation these choices must be based upon some rational and relevant distinction when choosing between members of the same class. It would seem that it would be an invidious discrimination by the state to declare that right-handed children could inherit but that left-handed children could not. This discrimination would be impermissible because within a class of children the distinction between those who are left-handed and those who

are right-handed bears no relation to the state's interests. This adoption statute creates two classes of children. The state creates a class of second class and a class of first class natural children.

It is not enough to say that the state must draw a line somewhere to promote the orderly disposition of property and therefore any line that is drawn is rationally related to the state's interests. The line must draw a *rational and relevant* distinction between members of the class. The statutory discrimination against children adopted into a family is not rationally related to the state's interest in an orderly disposition of property except in the sense that *any* choice the state makes will create a set of rules of inheritance which are more "orderly" than no rules at all.

Nor does the argument that the statute mirrors the presumed intent of the testator supply constitutional validity. This argument has been addressed and rejected in cases concerning illegitimacy.

> "It is unacceptable, not because it is irrational to assume that there are a significant number of private citizens who would intentionally punish children for the transgressions of their parents, but rather because such motivation on the part of the state is offensive to our concept of due process. In some communities, it would not be unrealistic to assume that most decedents would discriminate in favor of, or against members of a particular religious sect, race, political party or perhaps sex. But surely, the *state* may not, for that reason alone, make comparable discriminatory choices. Just as private schools or private hospitals may place some arbitrary limits on the classes of people they will serve, so may testators make irrational choices in a distribution of their property. *But when the choice is made by the government, the obligation to afford all persons equal protection of the laws arises.*" (emphasis added)

Eskra vs. *Morton*, 524 F.2d 9, 14 (1975)

Accord: *Trimble* vs. *Gordon*, 430 US 762, 775 *(supra)*

There is simply no legitimate state concern which is furthered by the arbitrary distinction between the rights of adopted and natural children to inherit, or as in the present case, to take under a Will which does not expressly include adopteds. On the contrary, the act of adoption is an affirmative and carefully considered act endorsing the family unit which deserves the support of the state. Petitioners respectfully submit that biological grounds alone are not sufficient to enable the State of Georgia to discriminate against them.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOKEY AND BOWDEN

By: _____

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APPENDIX

APPENDIX A

In the Supreme Court of Georgia

Decided: Illegible

35123. NUNNALLY et al. v. TRUST COMPANY BANK et al.

Jordan, Justice.

This appeal marks the second appearance of this case in this court. For a resolution of the issues contained in its first appearance and for a more exhaustive statement of facts than will be provided in this opinion, see *Nunnally* v. *Trust Co. bank,* 243 Ga. 42 (252 SE2d 468) (1979), wherein it was held that a will is to be construed according to the law in effect at the time of the testatrix's death.

Upon remand, the trial court found that Ga. L. 1941, p. 300, 306, though patently invidious because its exclusive effects were based on biological grounds only, was not constitutionally infirm because those effects in this case were not accomplished through state action. Mrs. McKee's two adopted great-grandsons appeal, contending that the trial court erred because the 1941 adoption statute is an unconstitutional violation of the Equal Protection clause of the United States Constitution and Art. I, Sec. II, Par. III of the State Constitution and that state action is present in its operation. In addition, appellants seek a declaration from this court, once we have held the 1941 adoption statute unconstitutional, that they are takers under Mrs. McKee's will as members of a class of "children" (or great-grandchildren within the facts of this case) since the public policy of this state is strongly in favor of the equalization of rights between natural and adopted children.

To begin, appellants do not attack the entire 1941 adoption statute. Rather, the offensive portion is as follows: "Section 11. *Final Order of Adoption* . . . If the court is satisfied that a final order of adoption should be entered, the court shall enter a decree of adoption, declaring the said child to be the adopted child of the petitioner [the adopting parent], and capable of inheriting his estate, and also what shall be the name of such child. Thereafter, the relation between such person and the adopted child shall be as to their legal rights and liabilities, the relation of parents and child, except the petitioner or petitioners shall never inherit from the child. When the final adoption shall have been granted, the [natural] parents of the child shall be divested of all legal rights or obilgations from them to the child or from the child to them; and the child shall be free from all obligations of any sort whatsoever to the said natural parents. *To all other persons the adopted child shall stand as if no such act of adoption had been taken.*" Ga. L. 1941, p. 305-306 (emphasis added).[1]

Case law at the time interpreted this statute to mean that adopted children could only inherit from their adoptive parents and not from any other adoptive relative. See *Comer* v. *Comer,* 195 Ga. 79 (23 SE2d 420) (1942) and cits. therein. Moreover, pursuant to the emphasized language in section 11, supra, adopted children were held not to be cut off from natural relatives other than their natural parents. *Alexander* v. *Lamar,* 188 Ga. 273 (3 SE2d 656) (1939).

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[1] That portion of the statute here under attack was amended in 1949 (after the death of the testatrix) to provide that an "adopted child shall be considered in all respects as if it were a child of natural bodily issue of petitioner or petitioners, and shall enjoy every right and privilege of a natural child of petitioner or petitioners to inherit under the laws of descent and distribution in the absence of a will and to take under the provisions of any instrument of testamentary gift, bequest, devise or legacy unless expressly excluded therefrom." Ga. L. 1949, p. 1157. See also Ga. L. 1977, pp. 201, 219.

As the situation stood in 1945, then, the year of the death of Mrs. McKee, an adopted child could inherit from his or her adoptive parents and from a natural grandparent, aunt, etc., but not through the adoptive line from anyone except the adoptive parents, and not from the natural parents.

Appellants content that within the class of similarly situated people, children within a family, the state has impermissibly drawn an invidious distinction between children adopted into the family and those born into it.

As the United States Supreme Court has said in withstanding an equal protection challenge to a statute conditioning the rights of illigitimates to inherit from their fathers, "few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." Lalli v. Lalli, 99 S.Ct. 518, 527 (1978). We have said that "[u]nder the equal protection guarantee of our State Constitution . . ., classification in legislation is permitted when the classification is based on rational distinctions, and the basis of the classification bears a direct and real relation to the object or purpose of the legislation. [Cits]." *Cannon* v. *Ga. Farm & c. Ins. Co.,* 240 Ga. 479, 482 (241 SE2d 238) (1978). Therefore, this court's inquiry is limited to identifying the ends the General Assembly intended to be served by Section 11, and insuring that the means chosen are rationally related to the promotion of those state objectives.

One aim of this statute is the state's interest in providing for the orderly disposition of property. Through its laws of intestate succession, the state has established a method of descent based upon the presumed intention of the decedent. Distinctions based on preferences do exist in this area of law. It is presumed, by

the state, that a person would wish for his or her property to pass within his or her bloodline, for example, and to children before grandchildren, and so forth. As long as these distinctions are rationally related to the state's interest in seeking the most orderly system possible for passing title to property from one person to another so that the state knows at all times exactly what is owned by whom, then the distinctions are constitutionally sound.

The right of an individual to inherit property through intestate succession is not a natural or inalienable right; rather, it is solely within the province of the state to prescribe for such succession as it deems necessary. *Pettiford* v. *Frazier,* 226 Ga. 438 (175 SE2d 549) (1970). The state must make choices. As one commentator has noted: "Intestate succession is older and more basic than succession by will . . . If we are to have inheritance at all we could scarcely get along without rules which dictate what relatives of the decedent shall inherit and in what proportion. There are other possible bases to determine the path of inheritance than those of blood or marriage, such as dependency, age, household connection, friendship, etc. . . These are so indefinite, however, that they would be difficult to apply and would lead to uncertainty and consequent litigation. As a practical matter we are driven to a system of intestate succession based upon consanguinity or affinity to the decedent, even if we might desire some other basis for determining heirship . . " Atkinson, Wills 32-33 (2d ed. 1953).

The state has used this concept of inheritance within the bloodline in drawing other valid distinctions. For example, if a person dies intestate survived by children, one of whom has predeceased the decedent, the spouse of that predeceased child is not allowed to take as the legal representative. See *Morris* v. *First Nat'l. Bank of Atlanta,* 202 Ga. 51 (42 SE2d 215) (1947). Code Ann. § 113-903 (4). The rationale for excluding a widowed daughter-in-law or son-in-law from the class of takers is very similar to the rationale for excluding adopted grandchildren.

The deceased child took an affirmative act in bringing his or her spouse into the immediate family and between husband and wife, as between adopted child and adopting parent, inheritance rights do exist. However, beyond the immediate relationship of husband and wife, in terms of a daughter-in-law or son-in-law taking from the deceased spouse's ancestors, it is as if no such act of marriage ever took place. There is a distinction drawn between daughters-in-law and sons-in-law and natural children, even though proving the identity of a son-in-law, for example, presents no problem because of the ease in referring to the marriage license. However, the state assumes that one would rather have his or her property pass within the bloodline rather than have people with a bare legal relationship to them share. We would consider this assumption a rational means to dispose of property in an orderly fashion.

The question in this case is not the wisdom of the General Assembly's choosing in 1941 to exclude adopted children from inheriting from only their adoptive parents and natural relatives other than their natural parents, nor is it the motive of the General Assembly in enacting this statutory scheme. Once again, "[l]egislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear *no rational relationship* to a permissible state objective. [Cits]." Parham v. Hughes, 99 S.Ct. 1742, 1745 (1979). One legislative objective in this case is the orderly disposition of property, and the means by which this is accomplished is presuming that a decedent, not a direct party to the act of adoption, would not intend for his or her property to pass to an adopted child but would rather intend for the property to pass through the bloodline. The sole question is whether this assumption on the part of the state is one rational way to achieve the orderly disposition of property. We conclude that it is.

We have not forgotten that the subject matter of this controversy is a will, and the property passing from this testatrix is not by intestate succession. However, the law of the case directs that Section 11 be used to construe Mrs. McKee's intent in her silence, and that same section is the one used to guide administrators when no will is present, much less a silent one, as to the meaning of "children." See *Nunnally* v. *Trust Co. Bank,* supra at 43. In using Section 11 to determine testamentary intent, the General Assembly and this court have defined the word "children" to include different classes of people at different levels. Contrary to the finding of the trial court, we conclude that there is state action involved in the operation of this statute. Section 11 dictates a result that would occur each time a will was silent as to the meaning of "children" or intestacy occurred in a family with adopted children. This was not a neutral, nondiscriminatory state law of will construction. This was the state making up the decedent's mind for him.

The statute plays the decisive role in supplying the missing intent of the silent testatrix, "[T]his is true because the statute fixing our rules of inheritance must be construed in pari materia with our adoption statute. [Cit]" *Thornton* v. *Anderson,* 207 Ga. 714, 717 (64 SE2d 186) (1951). Even though state action is involved we do not find an "invidious discrimination" in the statute such as would render it unconstitutional.

We conclude, therefore, that the result reached by the trial court was correct, though we differ with the reasoning contained in its order. Appellants are excluded from the class of trust beneficiaries provided for in Mrs. McKee's will, and the judgment of the trial court is affirmed for the reasons stated herein.

Judgment affirmed. All the Justices concur.

APPENDIX B

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA NOV 21, 1979

The motion for a rehearing was denied today:

Case No. 35123. Nunnally et al. v. Trust Company Bank, Co-Trustee, et al.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

"(b) My said daughter now has four children, namely: Winship Nunnally, Jr., Hugh McKee Nunnally, Jessie McKee Nunnally and Cora Winship Nunnally. Upon the death of my said daughter, my Trustees shall divide the corpus of this part of the trust into a sufficient number of shares so that each of the aforementioned children of my said daughter then living shall have a share thereof set apart for his or her benefit, and so that the children of any of the aforementioned children of my said daughter who may have predeceased her leaving issue surviving her shall have a share thereof set apart for their benefit, per stirpes:

"One of such parts shall be held by my Trustees for the primary benefit of each of the children above named living at my daughter's death, and the income from one of such shares paid to each such child during natural life, and at his or her death, the corpus thereof shall be conveyed to the issue of the decedent, per stirpes.

"One of such parts into which the corpus is to be divided at my daughter's death shall be conveyed to the issue, considered per stirpes, of each of the aforementioned children of my said daughter who may predecease my daughter, leaving issue surviving her.

"(c) If any of the aforementioned children of my said daughter should survive my daughter and die without descendants, then the corpus of the share whose income such decedent received during life shall at death be conveyed equally to those then surviving of my daughter's said children and to the issue of such thereof as may then be dead leaving issue then living, such issue to take per stirpes; but if there be none of my daughter's said children then living, and no living issue of any such deceased child, then the corpus of such share shall be added to and become a part of the trust created for the primary benefit of my daughter, Margaret McKee Moore, and her descendants, as hereinabove provided . . ."